# In the
# United States Court of Appeals
## For the Seventh Circuit

No. 96-1180

JO MINOR,

*Plaintiff-Appellant,*

*v.*

PRUDENTIAL SECURITIES, INC. and PATRICE MACKIE,

*Defendants-Appellees.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 2938—Brian Barnett Duff, *Judge.*

ARGUED MAY 31, 1996—DECIDED SEPTEMBER 4, 1996

Before BAUER, FLAUM, and KANNE, *Circuit Judges.*

FLAUM, *Circuit Judge.* Plaintiff, Jo Minor, filed a motion in district court to vacate an arbitration decision pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10. The arbitrator had ruled in favor of defendants, Prudential Securities and broker Patrice Mackie (collectively "Prudential") on Minor's various claims arising from a series of stock investments. The district court dismissed her motion to vacate for lack of subject matter jurisdiction. We affirm.

I.

In November of 1991, Prudential made a series of stock investments for Minor. Minor claims that Prudential misrepresented to her that certain of these investments were "safe," when in reality they were very high risk. Minor also claims that while she was a Prudential customer, Prudential effected at least one unauthorized trade in her account and forged her signature on a customer agreement. Minor maintains that as a result of these acts, she lost $17,797.86. In order to recover her losses, Minor filed a claim in arbitration before the National Association of Securities Dealers, Inc. ("NASD"). Minor and Prudential were subject to a pre-dispute arbitration agreement, contained in Minor's securities account agreement with Prudential. Minor's complaint consisted of nine counts: 1) breach of fiduciary relations; 2) breach of contract; 3) fraud; 4) constructive fraud; 5) lack of due care in performing a contract; 7) a violation of the Securities Act of 1934; 8) use of racketeering income to operate an enterprise, in violation of 18 U.S.C. § 1962(a); and 9) indirect participation in the conduct of a racketeering enterprise's affairs, in violation of 18 U.S.C. § 1962(c).

Arbitration hearings were held in December of 1994 and January of 1995. In the midst of the proceedings, a discovery dispute arose concerning one of Prudential's handwriting experts. Minor alleged that Prudential was attempting to conceal a negative report by switching their handwriting expert one day prior to the hearing. The Chairman of the Arbitration Panel held a conference on the issue and determined that Minor was entitled to a copy of the previous expert's report, but not to all of the materials surrounding the hiring of the two experts, as Minor had requested. At the conclusion of the hearing, the Arbitration Panel first found that Minor had withdrawn her RICO claims and then entered an award denying each of Minor's remaining claims. Displeased with the decision, Minor requested a statement of reasons from the Panel. On April 18, 1995, the Panel provided Minor with such a statement.

Minor then proceeded to file her "Motion to Vacate Arbitration Award" in the district court, pursuant to § 10 of the FAA. 9 U.S.C. § 10. In her motion, Minor claims that the arbitration award should be vacated because 1) it was procured by "corruption, fraud, or undue means," 2) the panel refused to hear evidence pertinent and material to the controversy, 3) there was "evident partiality" in the panel, and 4) the award was imperfectly executed because the panel wrongly stated that she had withdrawn her RICO counts. The district court dismissed the motion, finding a lack of subject matter jurisdiction, as the parties are not diverse and the motion to vacate presents no federal question.

## II.

It is now well established that § 10 of the FAA does not constitute a grant of subject matter jurisdiction.[1] There must be an independent basis of federal jurisdiction before a district court can entertain a motion to vacate under that section. *See Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 882, 883-84 (9th Cir.

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[1] Section 10(a) of the FAA provides:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

1993); *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255, 257 (6th Cir. 1994); *Harry Hoffman Printing v. Graphic Communications Local 261*, 912 F.2d 608, 611 (2d Cir. 1990); *Giangrande v. Shearson Lehman/E.F. Hutton*, 803 F. Supp. 464, 466 (D. Mass. 1992). The petitioning party must demonstrate that diversity or federal question jurisdiction exists. This follows from several Supreme Court cases, which have explained:

> The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise .... [T]here must be diversity of citizenship or some other independent basis for federal jurisdiction . . . [for] enforcement of the Act is left in large part to the state courts.

*Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983) (internal citations omitted); *see also Southland Corp. v. Keating*, 465 U.S. 1, 15 n. 9 (1984) ("While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction. . . ."). Thus the fact that Minor relies on the standards of review set forth in § 10 of the FAA to bring her motion to vacate is insufficient to establish federal court jurisdiction.

In this case, Minor attempts to invoke federal question jurisdiction, as it is undisputed that no diversity of citizenship exists between the parties. It is standard learning that federal question jurisdiction arises only when the complaint standing alone "establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983); *see also Phillips Petroleum Co. v. Texaco, Inc.*,

415 U.S. 125, 127-28 (1974) (federal question "must be disclosed upon the face of the complaint, unaided by the answer"). Looking to the face of Minor's motion to vacate, Minor asserts that federal jurisdiction is firmly grounded on the Securities Exchange Act of 1934 and on RICO. However, mere incantation of a federal statute does not confer jurisdiction; rather the dispute must actually involve a "substantial question of federal law." *See Franchise Tax Bd.*, 463 U.S. at 28; Ford, 29 F.3d at 258. It is clear that Minor's motion to vacate on the grounds of fraud, corruption, undue means, evident partiality, and failure to consider pertinent and material evidence, does not require the resolution of any federal issue, let alone a "substantial question of federal law." In addressing Minor's motion, the district court would not be called upon to decide any issue of federal law, whether related to the Securities Act or RICO. Minor's motion essentially alleges a claim of fraud in the discovery process. Minor failed to raise any federal question before the district court, and the court therefore lacked subject matter jurisdiction over the motion to vacate.

Minor quarrels with this analysis, arguing that we should look not to her motion to vacate for a jurisdictional ground, but rather to the underlying dispute in arbitration, which clearly involves claims under the Securities Act and RICO.[2] She basically asserts two justifications for this position. First, Minor maintains that if we restrict our search for jurisdiction to the actual motion in federal court, we will create a "topsy-turvy universe" in which claimants who

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[2] We note that the other circuit courts to consider federal jurisdiction in connection with motions to vacate under § 10 have not directly addressed the impact of an underlying federal question claim. In *Garrett*, 7 F.3d at 883, and *Ford*, 29 F.3d at 258-59, the underlying complaints were based on state law. The *Ford* court did note, however, that "[e]ven if a violation of federal securities law had been claimed to be involved in some way, jurisdiction to vacate the arbitration award would not necessarily have existed." *Id.* at 259 n. 5.

have asserted violations of federal rights are "relegated" to state court for post-arbitration proceedings, while claimants who have asserted state law violations who happen to satisfy diversity requirements are afforded a post-arbitration federal forum. This would be a strong argument if in fact Minor had asserted a violation of federal law and we were directing her to state court. But since § 10 of the FAA does not create a federal issue, Minor has essentially come to district court only with a claim of fraud, which is generally entrusted to state court unless the parties are diverse. Thus our approach is consistent with the normal state of the jurisdictional universe. If Minor's motion to vacate somehow involved the resolution of her federal claims or some question of federal law, then under the preceding analysis the district court would have jurisdiction.

Minor also asserts that the federal character of the underlying claims is sufficient to establish jurisdiction for purposes of § 10 because it is a sufficient jurisdictional basis for purposes of § 4 of the FAA:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration *may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties*, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4 (emphasis added). Minor therefore argues that it would be inconsistent and anomalous for parties to be able to obtain a motion to compel from a district court, based on the federal nature of the underlying dispute, but not be able to seek a motion to vacate or confirm (9 U.S.C. § 9) on the same basis.

The text of § 4 does appear to confer jurisdiction on federal courts to issue motions to compel in cases where the court would have jurisdiction over the underlying claims; and the Supreme Court has used language that could be

interpreted as implying the same: "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute. . . ." *Moses H. Cone*, 460 U.S. at 25 n. 32. A strong body of caselaw has developed, however, holding that the nature of the underlying dispute is irrelevant for purposes of subject matter jurisdiction, even on a motion to compel under § 4, i.e., the *motion* itself must invoke diversity or federal question jurisdiction. *See Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 986-88 (5th Cir. 1992); *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957, 960-64 (S.D.N.Y. 1988); *Klein v. Drexel Burnham Lambert, Inc.*, 737 F. Supp. 319, 322-24 (E.D. Pa. 1990); *Kaplan v. Dean Witter Reynolds, Inc.*, 896 F. Supp. 1219, 1221 (S.D. Fla. 1995); *In re Prudential Securities, Inc.*, 795 F. Supp. 657, 660-62 (S.D.N.Y 1992); *Giangrande v. Shearson Lehman/E.F. Hutton*, 803 F. Supp. 464, 469-73 (D. Mass. 1992). We need not decide whether federal question jurisdiction for purposes of a motion to compel under § 4 can be derived from the underlying dispute in order to resolve this case, because even assuming that this is so, we conclude that this result does not impact our analysis of motions to vacate under § 10.

The language giving rise to the argument that an underlying federal question is sufficient for federal jurisdiction under § 4 is absent from § 10. Section 10 does not state that a party "may petition any United States district court which, save for [the arbitration] agreement, would have jurisdiction under Title 28," to vacate an arbitration award. And we see no reason to artificially import the language into § 10, since we do not believe it is necessarily anomalous for Congress to have intended that federal courts take jurisdiction for purposes of a motion to compel where the underlying dispute is federal, but not take jurisdiction on a parallel motion to vacate. The primary purpose of the Arbitration Act was "to reverse the centuries of judicial hostility to arbitration agreements, by plac[ing] arbitration agreements upon the same footing as other con-

tracts." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). The central federal interest was enforcement of agreements to arbitrate, not review of arbitration decisions. Thus it would be reasonable for Congress to give federal courts the responsibility of ensuring arbitration agreements are upheld in cases where the courts would otherwise have jurisdiction. However, once the arbitration agreement is enforced, there exists no compelling need for the federal courts to be involved, unless a federal question is actually at issue or diversity is established. The central goal of the FAA will already have been addressed, and well-established rules of federal jurisdiction, including the well-pleaded complaint rule, should govern. Accordingly, merely because a district court may have jurisdiction over a motion to compel arbitration where an underlying federal question is at stake (an issue we do not decide today) does not mean the same holds true in the context of a § 10 motion to vacate. We simply hold that a district court has subject matter jurisdiction over a petition to vacate an arbitration award pursuant to 9 U.S.C. § 10 only where diversity of citizenship exists or the motion discloses a federal question on its face.[3]

For the foregoing reasons we AFFIRM the district court's dismissal of Minor's motion to vacate.

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[3] We note that dicta in our opinion in *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985), is not to the contrary, as in that case jurisdiction over the motion to confirm under § 9 was necessarily based on diversity of citizenship.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| JO MINOR, | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| v. | ) | No. 95 C 2938 |
| | ) | |
| PRUDENTIAL SECURITIES, INC., et al | ) | |
| | ) | |
| | ) | |
| Defendants | ) | |

MEMORANDUM OPINION

This case comes before this Court on the Defendants' "Motion to Dismiss Pursuant to Rule 12 for Lack of Subject Matter Jurisdiction or Alternatively to Dismiss on the Face of the Pleadings." The parties have fully briefed this issue. After considering all the arguments raised in the briefs, this Court holds that we lack subject matter jurisdiction to consider the Plaintiff's motion to vacate the arbitration award. Accordingly, the Defendants' motion to dismiss is granted.

## I. BACKGROUND

This case arises from a series of stock investments by the Plaintiff, Jo Minor (Minor), through a brokerage firm, Prudential Securities, Inc. (Prudential). As result of these investments, Minor lost $17,797.86, which she then sought to recover. Pursuant to a clause in the brokerage agreement, Minor was obligated to file a claim with the National Association of Securities Dealers Arbitration Division. She filed her claim against Prudential and Patricia Mackie, a Prudential agent,

alleging nine counts: 1) breach of fiduciary relations; 2) breach of contract; 3) fraud; 4) constructive fraud; 5) lack of due care in performing contract; 6) violation of the Illinois Securities Act; 7) violation of the Securities Act of 1934; 8) use of racketeering income to operate an enterprise in violation of 18 U.S.C. § 1962(a); and 9) indirect participation in the conduct of racketeering enterprise's affairs in violation of 18 U.S.C. § 1962(c).

During the arbitration proceedings, a dispute arose regarding the Defendants' expert witnesses. One day prior to the hearing, the Defendants changed their handwriting expert. The Plaintiff objected to the switch, suggesting that Defendants were attempting to conceal a damaging report by their previously retained expert, Steven Cane. The Plaintiff filed a motion to compel the Defendants to produce the Steven Cane report and all correspondence relating to the retention of Steven Cane and Jim Hayes as experts. Following a telephone hearing, the Chairman of the arbitration panel ("Panel") held that the Plaintiff was entitled to the engagement letter to Cane and a copy of the Cane report. However, he denied the Plaintiff's request to obtain all the correspondence surrounding the hiring of the experts based on relevancy and materiality grounds.

Following the proceedings, the Panel noted that the Plaintiff had withdrawn her RICO claims and found for the Defendants on the remaining counts. On April 18, 1995, following a request by the Plaintiff, the Panel provided its findings and reasoning. On May 16, 1995, the Plaintiff filed her "Motion to Vacate Arbitration Award." In her motion, Minor alleges that the arbitration award should be vacated because: 1) it was procured by "corruption, fraud, or undue means"; 2) the panel refused to hear evidence pertinent and material to the controversy; 3) there was "evident partiality" in the panel; and 4) the award was imperfectly executed because the panel wrongly stated that the plaintiff had withdrawn her RICO counts.

## II. DISCUSSION

Federal courts may only adjudicate cases which fall within the jurisdiction conferred by Article III of the United States Constitution. See *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989). Accordingly, a federal court must determine whether jurisdiction exists before examining the merits. On a motion to dismiss for lack of subject matter jurisdiction, the party alleging jurisdiction bears the burden of demonstrating subject matter jurisdiction. *Western Transp. Co. v. Couzens Warehouse Distrib., Inc.*, 695 F.2d 1033, 1038 (7th Cir. 1982); *Grafon Corp. v. Hauserman*, 602 F.2d 781, 783 (7th Cir. 1979). To this end, the Plaintiff claims that this Court has jurisdiction based on 28 U.S.C. § 1331 (general federal question jurisdiction), 15 U.S.C. § 78j(b) (Securities Exchanges Act of 1934), and 18 U.S.C. §1961 (Racketeer Influenced Corrupt Organizations Act). The Defendants counter that this Court lacks subject matter jurisdiction to address the Plaintiff's motion to vacate pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §10, because there is neither diversity nor federal question jurisdiction. After review of the caselaw, we find that we lack subject matter jurisdiction to address the Plaintiff's motion.

The Federal Arbitration Act itself does not confer subject matter jurisdiction. The Supreme Court has stated that:

> [t]he Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create an independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise.

*Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25, n.32 (1983). Since the FAA could not provide jurisdiction, an additional basis for federal jurisdiction was required. Following *Moses H. Cone Hospital*, there was initially some

dispute as to whether the independent jurisdictional grant requirement applied to all sections of the Federal Arbitration Act. However, it is now well-established that § 10 of the Federal Arbitration Act[1] does not constitute a grant of subject matter jurisdiction and requires some showing of an independent jurisdictional basis. See *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255, 257 (6th Cir. 1994); *Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 882, 884 (9th Cir. 1993); *Harry Hoffman Printing Inc. v. Graphic Communication, Int'l. Union, Local 261*, 912 F.2d 608, 611 (2d Cir. 1990). Therefore, a party must state an independent basis for federal jurisdiction, either by demonstrating diversity or invoking federal question jurisdiction.

It is undisputed that there is no diversity jurisdiction in this case. As the Defendants note in their motion to dismiss, the Plaintiff is an Illinois citizen, as is one of the Defendants,

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[1] Section 10 of the FAA, in relevant part, states:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Patricia Mackie. As diversity is lacking, this Court may only address the Plaintiff's motion if there is federal question jurisdiction. Such jurisdiction arises when a "well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983). " Merely referring to a federal statute, however, does not establish federal jurisdiction if the dispute does not involve 'a substantial question of federal law'" *Ford v. Hamilton Investments, Inc.*, 29 F.3d at 258 (citing *Franchise Tax Bd.*, 463 U.S. at 28). Since the FAA clearly does not establish an independent cause of action, this Court must determine whether the Plaintiff's motion to vacate depends on the "resolution of a substantial question of federal law." We find that it does not.

Federal subject matter jurisdiction must be asserted in the complaint. The well-pleaded complaint rule requires that federal jurisdiction must be disclosed on the face of the complaint, unaided by the answer. *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127-28 (1974). This Court, therefore, must examine the jurisdictional bases presented in Minor's motion to vacate.[2] In her motion, Minor specifically claims that this Court

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[2] The well-pleaded complaint rule normally refers to the complaint, which is the initial documents filed in federal court. However in arbitration proceedings, the initial document often is a motion to confirm or vacate an award. See *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 746 (11th Cir. 1988) ("The policy of expedited judicial action expressed in ...the Federal Arbitration Act... would not be served by permitting parties who have lost in the arbitration process to file new suit in federal court. The proper procedure ...is for the party seeking to vacate an arbitration award to file a Motion to Vacate in the district court.") . Therefore, since the well-pleaded complaint rule requires federal jurisdiction to be

(continued...)

has jurisdiction on two grounds: 1) the Securities Exchange Act of 1934 and 2) RICO.

In invoking the Securities Exchange Act and RICO, the Plaintiff relies on the subject matter of the underlying dispute to support federal question jurisdiction over her motion to vacate. However, merely referring to the Securities Exchange and RICO Acts in the motion to vacate is insufficient to confer subject matter jurisdiction. Minor's motion requests that this Court vacate the award because it was procured by "corruption, fraud, or undue means." Specifically, Minor alleges that the defendants hindered the discovery process and as a result affected the outcome. Minor's motion does not request that this Court decide or address underlying federal laws. It raises no securities or RICO issues for this Court to decide. While we acknowledge the seriousness of Minor's allegations of fraud, merely referring to the Securities Exchange Act and RICO, the subject matter of the underlying dispute, is insufficient to confer this Court with subject matter jurisdiction. See *Ford v. Hamilton Investments*, 29 F.3d at 258-59 (dismissing the case for lack of subject matter jurisdiction because the complaint, which requested vacating the award, relied solely on Michigan law and the National Association of Securities Dealers Rules as the jurisdictional bases and therefore failed to disclosed a federal question); *Garrett*, 7 F.3d at 884, n.3 (finding that citing the Securities Exchange Act in the petition to vacate an award did not support federal subject matter jurisdiction to vacate an award in favor of an employer on a wrongful termination claim). See also *Kaplan v. Dean Witter Reynolds, Inc. et al.*, 896 F.Supp. 1219, 1219-20 (S.D. Fla. 1995) (finding that an underlying securities claim was insufficient to establish federal question jurisdiction when the petition to vacate was only grounded on the FAA); *O'Leary v. Fanghella*,

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2(...continued)
adequately asserted in the initial document submitted to federal court, this Court must examine the jurisdictional grounds claimed in the motion to vacate.

866 F. Supp. 1119, 1120-21 (N.D. Ill.1994); *Giagrande v. Pearson Lehman/E.F. Hutton*, 803 F. Supp. 464, 468 (D. Mass. 1992); *Klein v. Drexel Burnham Lambert, Inc*, 737 F. Supp. 319, 324 (E. D. Pa. 1990).

Additionally, Minor claims that she was denied a "fair hearing" because the arbitration panel failed to hear pertinent evidence. This "fair hearing" assertion also fails to establish federal question jurisdiction. Minor's contention is that the panel did not hear certain relevant evidence which is impermissible under § 10 of the FAA. As discussed above, the FAA cannot be an independent basis for federal question jurisdiction. Thus, Minor does not have an independent jurisdictional basis for her motion to vacate.

This Court acknowledges that in a footnote in her response, Minor claims that her motion to vacate "raises on its face issues of a 'fair hearing' under the Due Process Clause of the U.S. Constitution". Since her motion to vacate does not refer to the Due Process Clause or the Constitution and only discusses a "fair hearing" in the context of the FAA, we find that Minor's original motion did not state the Due Process Clause as a basis for jurisdiction.

In the same footnote, Minor states that should this court not construe her "fair hearing" assertion as a due process claim, she seeks leave to amend " to specifically.. set out the constitutional basis for her claim." This Court grants the Plaintiff leave to amend. Awhile we need not decide the merits of her claim, we would like to note that any due process claim would face substantial hurdles. First, the arbitration panel appears to be a private entity, which prohibits any due process claim. *Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986) ("the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term "due process of law" cannot give rise to a constitutional complaint."). Second, since the panel allegedly violated Minor's right to due process, Prudential Securities and Patricia Mackie, the Defendants in the

current case, would be improper parties. This Court would take a dim view toward any amended complaint which did not overcome these obstacles; such a complaint would be meritless and might warrant sanctions.

III. CONCLUSION

For the reasons discussed above, this Court finds that it lacks subject matter jurisdiction to address the Plaintiff's motion to vacate. Accordingly, we grant the Defendants' motion to dismiss under Federal Rule of Civil Procedure 12 (b) (1).

ENTERED:

December 26, 1995

BRIAN BARNETT DUFF, JUDGE
UNITED STATES DISTRICT COURT

## ARBITRATION 9 U.S.C.§ 1

### § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
July 30, 1947, c.392, 61 Stat.670.

Historical Note
Derivation. Act Feb 12, 1925, c. 213, § 43 Stat. 883.

### § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration of the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall

proceed summarily to the trail thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by the law for making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction

to direct the parties to proceed with the arbitration and shall retain jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same, vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§11. Same; modification or correction; grounds; order

In either of the following cases United States court in and for the district wherein the award was made may make and order modifying or correcting the awards upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.